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Nos. 95-774 and 95-775

In the Supreme Court of the United States

OCTOBER TERM, 1995

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS IN OPPOSITION

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These petitions for a writ of certiorari challenge the validity of the Federal Communications Commission's current regulations governing rates for cable television. On February 1, 1996, two weeks after the

government filed its brief in opposition, Congress passed the Telecommunications Act of 1996. The President signed the bill into law on February 8, 1996. See Pub. L. No. 104-104 (1996).

Section 301 of the Telecommunications Act contains two significant provisions concerning the regulation of cable rates. Section 301(b) provides that rate regulation shall no longer apply to cable programming services provided after March 31, 1999. Section 301(c) provides for immediate deregulation of cable programming service rates and some basic tier rates charged by a small cable operator in any franchise area in which that operator services 50,000 or fewer subscribers.* The Act defines a "small cable operator" as a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entities whose gross annual revenues in the aggregate exceed $250,000,000.

By sharply curtailing the extent to which the FCC will continue to regulate cable rates, the Telecommunications Act diminishes the importance of petitioners' challenge to the Commission's current cable rate regulations. For that reason, and for the reasons previously discussed in our brief in opposition, the petitions for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FEBRUARY 1996

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* Section 301(b) and (c) is included as an appendix to this brief.

APPENDIX

TITLE III—CABLE SERVICES

SEC. 301. CABLE ACT REFORM.

* * * * *

(b) RATE DEREGULATION.—

(1) UPPER TIER REGULATION.—Section 623(c) (47 U.S.C. 543(c)) is amended—

(A) in paragraph (1)(B), by striking "subscriber, franchising authority, or other relevant State or local government entity" and inserting "franchising authority (in accordance with paragraph (3))";

(B) in paragraph (1)(C), by striking "such complaint" and inserting "the first complaint filed with the franchising authority under paragraph (3)"; and

(C) by striking paragraph (3) and inserting the following:

"**(3) REVIEW OF RATE CHANGES.**—The Commission shall review any complaint submitted by a franchising authority after the date of enactment of the Telecommunications Act of 1996 concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

"(4) SUNSET OF UPPER TIER RATE REGULATION.—This subsection shall not apply to cable programming services provided after March 31, 1999.".

(2) SUNSET OF UNIFORM RATE STRUCTURE IN MARKETS WITH EFFECTIVE COMPETITION.—Section 623(d) (47 U.S.C. 543(d)) is amended by adding at the end thereof the following: "This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.".

(3) EFFECTIVE COMPETITION.—Section 623(l)(1) (47 U.S.C. 543(l)(1)) is amended—

(A) by striking "or" at the end of subparagraph (B);

(B) by striking the period at the end of subparagraph (C) and inserting "; or"; and

(C) by adding at the end the following:

"(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area."

(c) GREATER DEREGULATION FOR SMALLER CABLE COMPANIES.—Section 623 (47 U.S.C. 543) is amended by adding at the end thereof the following:

"(m) SPECIAL RULES FOR SMALL COMPANIES.—

"(1) IN GENERAL.—Subsections (a), (b), and (c) do not apply to a small cable operator with respect to—

"(A) cable programming services, or

"(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994,

in any franchise area in which that operator services 50,000 or fewer subscribers.

"(2) DEFINITION OF SMALL CABLE OPERATOR.—For purposes of this subsection, the term 'small cable operator' means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated

with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.".

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